



disqualification of jurors, and appearance of fairness, and propose the following standard be adopted for Military Commissions:

A member shall be disqualified when there is good cause to believe that the member cannot provide the accused a full and fair trial, or the member's impartiality might reasonably be questioned based upon articulable facts.

### **Disqualification of Judges**

Under Rule for Courts-Martial (RCM) 902(a), a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might "reasonably be questioned."<sup>2</sup> A military judge shall also disqualify himself if specific grounds exist where the military judge has a personal bias or prejudice concerning a party; personal knowledge of disputed evidentiary facts concerning the proceeding; where the military judge has acted as counsel, investigating officer, legal officer, staff judge advocate, or convening authority as to any offense charged or in the same case generally; or where the military judge has expressed an opinion concerning the guilt or innocence of the accused. RCM 902(b). A military judge shall, upon motion of any party or *sua sponte*, decide whether he is disqualified. RCM 902(d).

This standard closely parallels 28 U.S.C. §455, which requires a federal civilian judge to disqualify himself in any proceeding "in which his impartiality might reasonably be questioned," and under such circumstances "where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." Appellate military courts consider the standards developed in the federal civilian courts, as well as military justice case law, when addressing disqualification issues arising under RCM 902. *United States v. Wright*, 52 M.J. 136, 140-41 (1999). In short, RCM 902, like 28 USC § 455, requires

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<sup>2</sup> Article 41(a) of the UCMJ (10 U.S.C. §841) discusses only the procedure for challenges for cause and quorum considerations, but not specific grounds for disqualification of either judges or jurors.

consideration of disqualification under a two-step analysis. The first step asks whether disqualification is required under the specific circumstances listed in RCM 902(b). If the answer to that question is no, the second step asks whether the circumstances nonetheless warrant disqualification based upon a reasonable appearance of bias.

A similar standard for disqualification of judges under international law is found under Rule 15(A) in both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR):

A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality.

### **Disqualification of Members<sup>3</sup>**

Under military law, court-martial members shall be excused for cause whenever it appears that a member has informed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged, or should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality. RCM 912(f)(1)(M) and (N). Examples of matters which may be grounds for challenge are that the member has a direct personal interest in the result of the trial; is closely related to the accused, a counsel, or a witness in the case; has participated as a member or counsel in the trial of a closely related case; has a decidedly friendly or hostile attitude toward a party; or has an inelastic opinion concerning an appropriate sentence for the offenses charged. *United States v. Velez*, 48 M.J. 220, 223 (1998) (citing Discussion, RCM 912(f)(1)(N)).

Federal law recognizes that a jury trial guarantees a criminally accused “a fair trial by a panel of impartial, ‘indifferent’ jurors,” and that the “failure to accord an accused a fair hearing

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<sup>3</sup> In that the triers of fact in the ICTY and ICTR are all judges, there is no separate standard for disqualification of jurors under their rules of procedure.

violates even the minimal standards of due process.” *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)(citations omitted). “The theory of the law is that a juror who has formed an opinion cannot be impartial.” *Id* (citing *Reynolds v. United States*, 98 U.S. 145, 155 (1878)). The general test for bias is whether a juror has such fixed opinions that they can not judge impartially the guilt of the defendant. *Patton v. Yount*, 467 U.S. 1025, 1035 (1984) (citing *Irvin*, 366 U.S. at 723). It is not required, however, that the jurors be totally ignorant of the facts and issues involved:

In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

*Irvin v. Dowd*, 366 U.S. 717, 722-723 (1961) (citations omitted). “But while one of an unpopular minority group must be accorded that solicitude which properly accompanies an accused person, he is not entitled to unusual protection or exception.” *Dennis v. United States*, 339 U.S. 162, 168 (1950).

### **Appearance of Fairness**

The requirement that an accused receive a full and fair trial under the President’s Military Order of November 13, 2001, section 4(c)(2), and MCO No. 1, paragraphs 1 and 6B(1), mandates that any standard for the qualification of Commission members must emphasize **fairness**. Similarly, the requirement for **impartiality** by a trier of law and fact is consistent with MCO No. 1, paragraph 6B(2), RCM 902(a), 28 U.S.C. §455, as well as Rule 15(A) utilized by

both ICTY and ICTR. Therefore, the terms “fairness” and “impartiality” are indispensable to any standard for disqualification.

The standards of the other forums discussed above have in common general prohibitions against personal interest, bias, prejudice, knowledge of disputed evidentiary facts, and expressed opinions as to the guilt or innocence of the accused. In short, these prohibitions seek to remove any actual or implied bias on the part of a member from the deliberative process of the tribunal, and are essential for fairness and impartiality in its verdict. Therefore, any standard for disqualification of a member should include some means to assess the *voir dire* answers of potential members in order to determine their fitness for service on a Commission. In that the qualification standard of “good cause” required by MCO No. 1, paragraph 4A(3) is abstract, a “test” should be incorporated in the standard for qualification that advises the parties whether good cause really exists to believe that the member can fulfill his or her duty. This “test” is tantamount to a standard of appearance that the proceedings are fair and impartial.

Both military and federal law recognize the necessity for a standard to ensure the appearance of fairness of their respective systems. The appearance standard is designed to enhance public confidence in the integrity of the judicial system, and “serves to reassure the parties as to the fairness of the proceedings, because the line between bias in appearance and in reality may be so thin as to be indiscernible.” *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988)). “Justice must satisfy the appearance of justice.” *United States v. Butcher*, 56 M.J. 87, 94 (2001) (Baker, J. concurring, citing *Liljeberg*, 486 U.S. at 864.)

Such a recognized “appearance standard” is found in both RCM 902(a) and 28 U.S.C. §455(a) which requires a judge to disqualify himself if his “impartiality might reasonably be

questioned.” See *Cheney v. United States Dist. Court for D.C.*, 541 U.S. \_\_\_\_ (2004) (Memorandum of Justice Scalia), and *Butcher*, 56 M.J. at 90.

Similarly, an appearance standard applicable to court-martial members is found in RCM 912(f)(1)(N), which requires the excusal for cause whenever it appears that a member “[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as legality, fairness, and impartiality.” The focus of RCM 912(f)(1)(N) is on the “perception or appearance of fairness” and “reflects the President’s concern with avoiding even the perception of bias, predisposition, or partiality.” *United States v. Strand*, 59 M.J. 455, 458 (2004) (citing *United States v. Dale*, 42 M.J. 384, 386 (1995); and *United States v. Minyard*, 46 M.J. 229, 231 (1997)).

To properly apply an appearance standard test, the facts alleged by the challenger must be articulable. Under military law, a judge should carefully consider whether any of the grounds for disqualification exist in each case, and broadly construe grounds for challenge, but should not step down from a case unnecessarily. Discussion, RCM 902(d). Federal case law suggests that the challenger must be able to show specific evidence that a juror is, in fact, impartial:

The affirmative of the issue is upon the challenger. Unless he shows the *actual existence* of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside . . . . If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed.”

*Irvin v. Dowd*, 366 U.S. at 723 (emphasis added).

### **Proposed Standard**

The standard for challenge must emphasize fairness and impartiality. The standard should also include some objective test to determine whether a particular member can be fair and impartial, recognizing that the test is based upon specific facts rather than baseless assertions of partiality. Considering the appearance standard (*i.e.* “reasonably be questioned” verbiage)

expressed in both RCM 902(a) and 28 U.S.C. §455, and given “the interest of having the (proceeding) free from substantial doubt as legality, fairness, and impartiality” required by RCM 912(f)(1)(N), it is prudent that the standard for challenge applicable to Military Commissions should include such an objective test. *See Butcher*, 56 M.J. at 91.

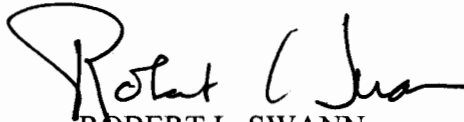
Accordingly, the Prosecution proposes the following standard for challenges for cause of Military Commission members be adopted:

**A member shall be disqualified when there is good cause to believe that the member cannot provide the accused a full and fair trial, or the member’s impartiality might reasonably be questioned based upon articulable facts.**

3. Citations to Legal Authority. The Prosecution cites the following legal authority in support of this memorandum of law:


- a. Military Commission Order No. 1
- b. BLACK’S LAW DICTIONARY (6<sup>th</sup> ed. 1990)
- c. DoD Directive 5105.70
- d. Rule for Courts-Martial (RCM) 902, Manual for Courts-Martial (2000 ed.)
- e. 28 U.S.C. §455
- f. Article 41(a) of the UCMJ (10 U.S.C. §841)
- g. *United States v. Wright*, 52 M.J. 136 (1999)
- h. Rule 15(A), International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)
- i. RCM 912, MCM (2000 ed.)
- j. *United States v. Velez*, 48 M.J. 220, 223 (1998)
- k. *Irvin v. Dowd*, 366 U.S. 717 (1961)
- l. *Patton v. Yount*, 467 U.S. 1025 (1984)

- m. *Dennis v. United States*, 339 U.S. 162 (1950)
- n. President's Military Order of November 13, 2001
- o. *United States v. Butcher*, 56 M.J. 87 (2001)
- p. *Cheney v. United States Dist. Court for D.C.*, 541 U.S. \_\_\_\_ (2004)
- q. *United States v. Strand*, 59 M.J. 455 (2004)

  
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CERTIFICATE OF SERVICE

I certify that the above Prosecution memorandum of law was served in person on Defense Counsel for the Accused this 22 day of September 2004.

  
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